

# FOIA

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(b)(6) and (b)(7)(C)

The Privacy Exemptions



# Presentation Goals

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- Hello!
- Review (b)(6) FOIA determination process and relevant cases
- Identify some miscellaneous privacy and public interest categories that may or may not apply

Note: this is a generalized training. Specific determinations and consultation of resources (DOJ FOIA guide, case research, relevant SJA, etc.) will still be required.

DOJ FOIA guide: <https://www.justice.gov/oip/doj-guide-freedom-information-act-0>



# Hello from Code 14!

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- OJAG Code 14 is the Navy's general FOIA appeals office
- OGC assists with civilian, contract, and other appeals
  - These offices also handle FOIA litigation (when it arises)
- HQMC and DNS-36/DONCIO: Run FOIA
- Code 13: initial command advice on FOIAs
  - But talk to your SJA/Resources first



# FOIA (b)(6) and (b)(7)(C)

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- Personal Privacy exemptions of the FOIA
- Generally follow the same paradigm
  - (b)(7)(C) has been found to be categorically stronger for redaction, withholding
- Not special!
  - the FOIA's "presumption favoring disclosure...is at its zenith under Exemption 6." *Consumers' Checkbook Ctr. for the Study of Servs. v. HHS*, 554 F.3d 1046, 1057 (D.C. Cir. 2009)



# FOIA (b)(6): How to process

- ...(6) personnel and medical files and similar files the disclosure of which **would constitute a clearly unwarranted** invasion of personal privacy
- Process of review:
  - 1) Is the data in a “personnel medical or similar file?”
  - 2) Is there a significant privacy interest in the requested info?
  - 3) What is the requester’s asserted public interest in disclosure?
  - 4) Balance the interests to determine whether disclosure “would constitute a clearly unwarranted invasion of personal privacy”



# 1. A Personnel/Medical/Similar File?

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- Similar files: broadly interpreted! Can be document or “non-lexical.”
- Not required to be about medical or personal issues, or to be intimate” or highly personal. *Cook v. NARA*, 758 F.3d 168, 174 (2d Cir. 2014)
- Protection “surely was not intended to turn upon the label of the file which contains the damaging information.” All information that “applies to a particular individual” meets the Exemption 6 threshold for protection. *U.S. Dep't of State v. Wash Post Co*, 456 U.S. 595 (1982).



# 1. A Personnel/Medical/Similar File? (cont'd)

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- Threshold generally not met if information cannot be linked to a specific individual, or pertains to government employees in a solely business nature

- Examples of (b)(6) “similar file” materials:

Consumer complaints filed with the FTC

Immigration Asylum Requests

Detainee Abuse Reports

Individual’s Audio/Video

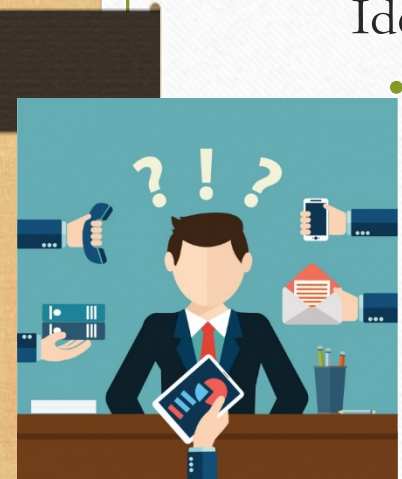
Challenger Crew Voices

Geographic Information System files containing “specific geographic location of structures”

- (b)(6): DOJ paralegal names and work telephone numbers not “similar files” as the information was purely business in nature.
  - *But See Pinson v. DOJ*, 313 F. Supp. 3d 88, 112 (D.D.C. 2018) (observing courts have differing conclusions regarding protection of work telephone numbers and email addresses of federal employees, and holding such information is withholdable)
- FYSA: OPM Regulation, 5 C.F.R. § 293.311 (2018): Generally no privacy for titles, grades, salaries, and duty stations as employees, qualifications (from applications), unless law enforcement/sensitive occupation.

## 2. Significant privacy interest in requested info: DOD

- DoD Director for Administration and Management Memorandum for DOD FOIA Offices (Nov. 9, 2001); Office of Secretary of Defense, Withholding of Information that Personally Identifies DOD Personnel Memorandum (Sep 1, 2005):
  - Federal Employees involved in law enforcement, as well as military personnel and employees in sensitive occupations, do possess, by nature of their work, have substantial privacy interests in their identities and work addresses.
    - However, certain personnel names can be released due to “the nature of their positions and duties,” including public affairs and flag officers.
    - *Seife v. Dep't of State*, 298 F. Supp. 3d 592, 628 (S.D.N.Y. 2018) (finding privacy interest in DOD names to be stronger than public interest in disclosure for DOD personnel holding military rank of Colonel or below, or holding General Schedule rank of GS-15 or below)
- Note: Law enforcement interests generally protected with (b)(7)(C) companion –that’s next training!





## 2. Significant privacy interest in requested info?

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- Is there a substantial, as opposed to a de minimis privacy interest?
  - “[i]f no significant privacy interest is implicated...FOIA demands disclosure.” *Multi Ag Media LLC v. USDA*, 515 F.3d 1224, 1229 (D.C. Cir. 2008) (quoting *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989))
  - However, “[s]omething, even a modest privacy interest, outweighs nothing every time.” *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989). ***No public interest in information = no disclosure.***
  - “Where there is a substantial probability that disclosure will cause an interference with personal privacy, it matters not that there may be two or three links in the causal chain.” *Horner*, at 873. ***The impact need not be immediate as long as it is reasonably anticipated.***
  - The privacy interest need not be “patent or obvious,” but must “be real rather than speculative,” and there must be a “causal relationship between the disclosure and the threatened invasion of privacy.” *Horner* at 878.
    - Must be able to articulate why harassment, mistreatment, etc. is anticipated.
    - *Sai v. TSA*, 315 F. Supp. 3d 218, 262-63 (D.D.C. 2018) (agency “offered little more than conclusory assertions” regarding privacy interests of various TSA and DHS employees “without regard to the position held by the relevant employee, the role played by that employee, the substance of the underlying agency action, or the nature of the agency record at issue”)
    - *Pinson v. DOJ*, 313 F. Supp. 3d 88, 112 (D.D.C. 2018) (finding that “conclusory” and “generalized” allegations of privacy harms are insufficient for protection of records under Exemption 6)

# Okay...

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So if there is a privacy interest I can redact...

*But how do I KNOW if there is a privacy interest?*

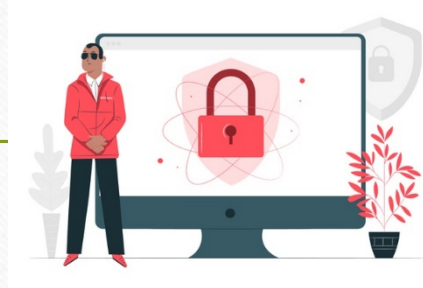


## 2. Significant privacy interest in requested info? (cont'd)

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- “Privacy” encompasses an individual’s control of information concerning his or her person, including the “prosaic” (e.g., place of birth and date of marriage) as well as the intimate and potentially embarrassing. *DOJ v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 763 (1989) (emphasis underlying)
  - (b)(6) Privacy belongs to the individual, not the agency holding the information.
    - Can’t withhold an individual’s own information from them under (b)(6). (*Note: Consider Privacy Act too!*)
    - Author and subject may both have interests, if they are different parties.
    - Foreign nationals have the same privacy rights under the FOIA as they afford U.S. citizens.
    - Corporations are not “citizens” and do not have privacy protections under the FOIA. However, closely held corporations or small business otherwise not separable from their owners may qualify for protections.
    - Expectation of Privacy may be reduced by an individual’s own actions
  - Sometimes deletion of names and other identifying data is not enough. Ex: *Alirez v. NLRB*, 676 F.2d 423, 428 (10th Cir. 1982), finding deleting names/details pertaining to small group of co-workers was simply inadequate to protect them from embarrassment or reprisals because requester could still possibly identify individuals. (*Exemption 7(C)*)

## 2. Significant privacy interest in requested info? (cont'd)



- Examples of (b)(6) protected materials:
- Passport applications, identities of GTMO detainees, rap sheets, Errantly released SSN numbers, place of birth, date of birth, date of marriage, employment history, physical address, email address, image, computer user ID, phone number, criminal history, medical history.
  - But see *Int'l Counsel Bureau v. DOD*, 723 F. Supp. 2d 54, 66 (D.D.C. 2010) (rejecting that detainee photos would risk their safety upon release, through reprisals, or undermine their willingness to cooperate with intelligence activities)



# Miscellaneous Privacy Considerations

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- **Practical obscurity:** Generally no interest for previously disclosed information, but may regain if data is “practically obscure” or hard to find.
- **Survivor privacy:** Considers the surviving family’s interest in privacy and avoiding harassment, embarrassment, or intrusion. Typically limited to death photos and similar graphic or embarrassing details.
- **Derivative Privacy Invasions:** Release may lead to others invading the privacy of an individual.
  - *Judicial Watch, Inc. v. Dep't of the Army*, 402 F. Supp. 2d 241, 251 (D.D.C. 2005) (Court found it “likely” records would be published on the internet and that media reporters would seek out employees; “[t]his contact is the very type of privacy invasion that Exemption 6 is designed to prevent”)

# Miscellaneous Privacy Considerations

- **Job Performance:** favorable or unfavorable, to avoid embarrassment or inciting jealousy. *May be reduced if employee is retired.*
- **Public Domain:** information that would otherwise be subject to a valid FOIA exemption must be disclosed if that information is preserved in a permanent public record or is otherwise easily accessible by the public; however, **a requester** must be able to point "to specific information in the public domain that *appears to duplicate* that being withheld" *Afshar v. Dep't of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983); see, e.g., *Edwards v. DOJ*, No. 04-5044, 2004 WL 2905342, at \*1 (D.C. Cir. Dec. 15, 2004)
  - Additional info is not necessarily required to be disclosed. Consider how easily accessible the information is: ability to access vs. ability to focus. *Am. Farm Bureau Fed'n v. EPA*, 836 F.3d 963, 972 (8th Cir. 2016)
  - *Gawker Media LLC v. FBI*, 145 F. Supp. 3d 1100, 1108-11 (M.D. Fla. 2015) (ordering disclosure of names of individuals involved in highly-publicized investigation where such names were disclosed in open court and were subject of widespread media attention)
  - **Personal knowledge, or limited public knowledge, is insufficient to establish a right via public domain.**





# Miscellaneous Privacy Considerations

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- **Passage of time:** Usually increases privacy interests (think practical obscurity), but may also diminish (if stigma has diminished).
- **Life Status:** Must make a reasonable attempt to determine life status to appropriately balance privacy vs. public interests. Dead = reduced interest.
  - FBI “100 year rule” approved by court: assume an individual is alive unless his or her birth date is more than 100 years ago. Schrecker, 349 F.3d at 662-65
- **Public Figures/Servants:** Do not, by virtue of public status, forfeit all rights, but have reduced privacy interests where records are keeping the governors accountable to the governed.
- **Privacy Assurances:** Generally increase privacy interests, but not dispositive.
- **Reverse FOIAs:** request court order an agency to *not* release information.

# Okay, we have a privacy interest.

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What next?

PUBLIC INTEREST!!!

**“In order to trigger the balancing of public interests against private interests, a FOIA requester must (1) show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake, and (2) show the information is likely to advance that interest.”** *Martin v. DOJ*, 488 F.3d 446, 458 (D.C. Cir. 2007) (quoting *Boyd v. DOJ*.)



### 3. What is public interest?

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- Information that informs the public about “an agency's performance of its statutory duties.... *DOJ v. Reporters Comm.*
- “The basic purpose of the Freedom of Information Act[,] 'to open agency action to the light of public scrutiny.’” *Dep't of the Air Force v. Rose*, 425 U.S. 352, 372 (1976)
- “We must weigh the privacy interest...in nondisclosure...against **the only relevant public interest in the FOIA balancing analysis—the extent to which disclosure of the information sought would 'shed light on an agency's performance of its statutory duties' or otherwise let citizens 'know what their government is up to.'"** *DOD v. FLRA*, 510 U.S. 487, 497 (1994)(quoting *DOJ v. Reporters Comm.*).

### 3. What is the *asserted* public interest?

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- “It is the requester's obligation to articulate a public interest sufficient to outweigh an individual's privacy interest, and the public interest must be significant.” *Salas v. IG*, 577 F. Supp. 2d 105, 112 (D.D.C. 2008).
  - Singular investigations or incidents are often not enough to overwhelm a privacy interest. *Id.*
- “Where the privacy concerns . . . are present, the exemption requires the person requesting the information to establish a sufficient reason for the disclosure... the public interest sought to be advanced [must be] a significant one, an interest more specific than having the information for its own sake.” *NARA v. Favish*, 541 U.S. 157, 172 (2004) (regarding (b)(7)(C) companion)



### 3. What is not a public interest?

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- Mere allegations of wrongdoing do not constitute a FOIA public interest and cannot outweigh an individual's privacy interest in avoiding unwarranted association with such allegations. *NARA v. Favish*, 541 U.S. 157, 175 (2004).
- “A ‘bare suspicion’ of agency misconduct is insufficient; the FOIA requester ‘must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred’” *Aguirre v. SEC*, 551 F. Supp. 2d 33, 56 (D.D.C. 2008) (quoting *Favish*, 541 U.S. at 174))
- Public interest is not usually served by disclosure of information regarding unsubstantiated allegations against government employees. *McQueen v. United States*, 264 F. Supp. 2d 502, 533-34 (S.D. Tex. 2003) )

### 3. What is maybe a public interest?

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- Public interest in learning of a government employee's misconduct increases as one moves up an agency's hierarchical ladder. *Trentadue v. Integrity Comm.*, 501 F.3d 1215, 1234 (10th Cir. 2007)
  - Example: “Against the backdrop of broader public concerns about the agency's handling of allegations of corruption leveled against high-ranking public officials...the public has a clear interest in documents concerning” a DOJ's investigation into a Congressman accused of providing earmarks and contracts to donors. *CREW v. DOJ*, 846 F. Supp. 2d 63, 67 (D.D.C. 2012).
- Significant Misconduct/Public Events may increase public interest. *Schmidt v. U.S. Air Force*, No. 06-3069, 2007 WL 2812148 (C.D. Ill. Sept. 20, 2007) (Public had interest in deadly friendly-fire event investigation).



# Miscellaneous Public Interest Considerations

- The FOIA requester's identity has no bearing on the request.
  - Personal interest and/or knowledge does not affect analysis. (*DOJ v. Reporters*)
- No public interest (alone) in info re foreign governments/individuals
- No real value to (b)(6) information to ensure compliance by others
  - where disclosure of personal information reveals nothing “directly about the character of a government agency or official” but rather, bears only an “attenuated . . . relationship to governmental activity,” such an attenuated public interest in disclosure does not outweigh individuals’ privacy interests in their personal information. *Hopkins v. HUD*, 929 F.2d 81, 88 (2d Cir. 1991).



# Miscellaneous Public Interest Considerations

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- Sometimes can use codes or markers to help show trends
  - Ex: to review for patterns of government surveillance of protestors/first amendment expression, harassment/termination of LGBTQ employees, etc.
- Derivative use: Supreme Court declined to determine whether or not a derivative use of information could be weighed against privacy interests. D. C. court has permitted in some instances, but 2<sup>nd</sup> and 9<sup>th</sup> Circuit are more limited.
  - Lists of wireless cell tracking data (shows crimes used for and prosecution success rate)
  - Lists of who has sold land to the government (how does an agency acquire property)
  - Political protestors and criminal investigations, pardon applicants, etc.





## 4. Balancing the Competing Interests

- Only get to step 4 if both a privacy AND public interest are identified for the information.
- Is there a nexus between the information requested and asserted interest?
  - *Vento v. IRS*, Civil Action No. 08-159, 2010 U.S. Dist. LEXIS 33751, at \*23 (D.V.I. Mar. 31, 2010). “While Plaintiffs argue they seek [each and every document in Plaintiff’s IRS tax liability file] information merely to know what the government is “up to,” such an argument is plainly disingenuous given the ongoing enforcement proceedings against Plaintiffs.
- How much information is already in the public domain vs. what is in the records requested?
  - Can consider declining if there is an alternate way to obtain the data. *Not a per se defense.*
  - *Serv. Emps. for Envtl. Ethics v. U.S. Forest Serv.*, 524 F.3d 1021, 1028 (9th Cir. 2008): Agency’s performance regarding its response to a fire would not be further informed by releasing the names of employees responding to fire, given extensive public data already in circulation.
  - *Associated Press v. DOD*, 462 F. Supp. 2d 573, 577-78 (S.D.N.Y. 2006): strong public interest in detainee photos, which would permit the public to assess the DOD’s fulfilling duties of care, feeding, etc.

## 4. Balancing the Competing Interests



- Privacy interests don't automatically win.
- Example: *Multi Ag Media LLC v. USDA*, 515 F.3d 1224, 1229 (D.C. Cir. 2008). Multi AG Media requested information regarding a “GIS database” and compliance files.
  - The USDA stated this information was private, as it included data on crops, land photos, etc. could permit inferences about the financial status of a farm.
  - Multi AG stated that economic variables would limit inferences, but that the data could shed light on how the USDA monitored its subsidy and benefit programs and use of public funds.
  - Court balanced and found, because the records would help the public monitor how the USDA was monitoring subsidies, and with the FOIA's presumption in favor of disclosure, the records would be disclosed.

*...and of course all the other cited cases!*



# Final Notes and Lessons Learned

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- DOJ FOIA guide is a great first stop.
  - Conduct additional research-or liaison
- Be able to articulate a basis for your redactions or withholding.
  - Segregation of information is a future training topic – watch for announcements!
- Save copies of the redacted and unredacted records.
- Don't forget Privacy Act and/or Touhy processing!